

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      NOV. 3, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Food-Tek, Inc.  
v.  
Rhodia, Inc.<sup>1</sup>

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Opposition No. 99,676  
to application Serial No. 74/529,590  
filed on May 25, 1994

Cancellation No. 24,523  
(consolidated case)

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Norman E. Lehrer of Norman E. Lehrer, P.C. for Food-Tek,  
Inc.

Mark I. Feldman of Rudnick & Wolfe for Rhodia, Inc.

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Before Seeherman, Wendel and Bottorff, Administrative  
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant/respondent Rhodia, Inc. (hereinafter  
"defendant") is the owner of application Serial No.  
74/529,590, by which it seeks to register on the Principal  
Register the mark YOUR FOOD TECH PARTNER, in the stylized

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<sup>1</sup> By assignment from Rhone-Poulenc, Inc., recorded July 22, 1998  
at Reel 1758, Frame 0879.

lettering depicted below, for services recited as "information services, namely providing information regarding food ingredient use."

Defendant also owns Registration No. 1,896,675, which is of the mark YOUR FOOD TECH PARTNER, in typed form, for services recited in the registration as "providing information regarding food-ingredient use."

In these consolidated opposition and cancellation proceedings, opposer/petitioner Food-Tek, Inc. (hereinafter "plaintiff") has opposed issuance of the registration sought by defendant in the above-referenced application, and also has petitioned to cancel defendant's above-referenced registration. As grounds for opposition and cancellation, plaintiff has alleged that it is the prior user of the service mark and trade name FOOD-TEK for services recited in the notice of opposition and petition to cancel as "consulting services in the field of food manufacturing and food product research and development." Plaintiff also has alleged that defendant's marks, as used in connection with defendant's recited services, so resemble plaintiff's

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previously-used service mark and trade name as to be likely to cause confusion, to cause mistake, or to deceive. See Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Defendant has filed answers to the notice of opposition and the petition to cancel, by which defendant has denied those allegations which are essential to plaintiff's Section 2(d) claims. Plaintiff and defendant have filed main briefs, and plaintiff has filed a reply brief. No oral hearing was requested.

The evidence of record in this case consists of the pleadings; the files of the application and registration involved in these opposition and cancellation proceedings; plaintiff's testimony deposition of plaintiff's president Gilbert Finkel, and exhibits attached thereto; defendant's testimony depositions of defendant's employees Joseph Downes and Debbie Remillard, and exhibits attached thereto; a status and title copy of defendant's involved registration, submitted by defendant under notice of reliance; portions of the discovery deposition of plaintiff's president Gilbert Finkel, submitted by defendant under notice of reliance; various documents and other materials asserted to be "printed publications," submitted by defendant under notice of reliance; and the stipulated rebuttal testimony of plaintiff's president Gilbert Finkel, and exhibits attached thereto.

Before turning to the merits of the parties' dispute, the Board rules as follows on the numerous evidentiary objections made by each of the parties.

Defendant's objections to the stipulated rebuttal testimony of Gilbert Finkel, and to plaintiff's Exhibits 46-50 attached thereto, are overruled. This evidence regarding plaintiff's knowledge of, and its actions taken against, certain third parties shall be considered for whatever probative value it might have.

Plaintiff, in its briefs, has raised hearsay objections to Debbie Remillard's testimony (transcript pp. 48-60) regarding her investigation of certain third parties' uses of FOOD TECH, and likewise objects to defendant's corresponding Exhibit Nos. 62-80 on the grounds of hearsay, lack of foundation and lack of authentication. Initially, the Board rejects defendant's contention that plaintiff waived its hearsay objections by failing to raise them during Ms. Remillard's deposition. Hearsay is a substantive objection going to a defect in the evidence which could not have been cured by defendant even if plaintiff had raised the objection during the deposition. See Trademark Rule 2.123(k) and Fed. R. Civ. P. 32(d)(3)(A), and TBMP §718.04.<sup>2</sup>

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<sup>2</sup> To the extent that defendant is relying on *Pass & Seymour, Inc. v. Syrelec*, 224 USPQ 845 (TTAB 1984) for the proposition that hearsay objections are waived if not timely raised, defendant's reliance is misplaced. In that case, the defendant waited until its brief on the case to object to certain exhibits introduced by

The Board agrees with plaintiff that Ms. Remillard's testimony concerning what she was told by other persons during her telephone conversations with such persons, and her notes of those telephone conversations, are inadmissible hearsay. See Fed. R. Evid. 802; *Tiffany & Co. v. Classic Motor Carriages Inc.*, 10 USPQ2d 1835, 1839 n.5 (TTAB 1989). Accordingly, the Board sustains plaintiff's objection to such testimony from Ms. Remillard, and to defendant's Exhibit Nos. 62, 66, 68, 71-75 and 77-78. As for Exhibits 63-65, 67, 69-70 and 76, which are materials which Ms. Remillard testified that she had asked for and received from certain of the third parties she spoke with, the Board has considered these materials, but only to the extent that they prove that the third parties send out such materials upon request. See *Tiffany & Co., supra*.

Next, plaintiff has objected to consideration of defendant's Exhibit Nos. 85-111, which are documentary materials submitted by defendant under notice of reliance.

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the plaintiff during a testimony deposition. The grounds for the objections included, inter alia, that the exhibits were inadmissible hearsay and that the plaintiff had failed to lay a proper foundation for establishing that the exhibits fell within the "business records" exception to the hearsay rule. Because the foundation objection to the exhibits could have been cured if seasonably raised, and because the hearsay objection was based solely on the exhibits' lack of proper foundation as "business records," the Board held that the defendant had waived both the foundation and the hearsay objections. Thus, *Pass & Seymour* actually involved a foundation objection, not a hearsay objection, and the case does not stand for the proposition that hearsay objections, in general, are waived if not raised promptly.

Plaintiff contends that these documents are irrelevant to the extent that they fail to demonstrate third-party use of FOOD TECH in connection with the specific services rendered by plaintiff and defendant, and that they also are irrelevant to the extent that they demonstrate use of FOOD TECH by third parties in foreign countries. Plaintiff further contends that certain of the exhibits consist of materials which are not "printed publications" and which therefore cannot be made of record by notice of reliance under Trademark Rule 2.122(e).

Plaintiff's relevancy objections are overruled. The evidence pertaining to use of FOOD TECH by third parties in foreign countries is derived from trade publications and other proper sources which are published or made available in the United States and which are directed to the relevant purchasing public in the United States. This evidence is relevant and admissible to the extent that it shows that purchasers in this country are exposed to these articles, listings and other published items concerning use of the term FOOD TECH by third parties, including use in foreign countries. As for the documents which pertain to third-party use of FOOD TECH in connection with goods and services which assertedly are not the same as plaintiff's and defendant's services, plaintiff's objection goes to the

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proper probative weight of the evidence, not to its admissibility. The Board accordingly has considered this evidence, and has taken care to accord it the proper probative weight.

As for plaintiff's objection on the ground that the materials submitted by defendant under notice of reliance are not "printed publications" admissible under Trademark Rule 2.122(e), we overrule the objection in part and sustain it in part. Defendant's Exhibit Nos. 85-89 are standard reference works and thus are admissible as printed publications. Defendant's Exhibit Nos. 91-95, 98-99 and 103 are electronically generated printouts, obtained from the NEXIS® and DIALOG® databases, of articles from publications of general circulation, and thus are admissible as printed publications. See *Weyerhauser v. Katz*, 24 USPQ2d 1230 (TTAB 1992); TBMP §708. Defendant's Exhibit Nos. 96 and 97 are photocopies of the articles appearing in the actual printed publications of general circulation. Defendant's Exhibit Nos. 104 and 105 are Dun & Bradstreet reports, which have been held in the past to be admissible. See *Tiffany & Co., supra*; *Stagecoach Properties Inc. v. Wells Fargo & Co.*, 199 USPQ 341, 354-57 (TTAB 1978). Accordingly, we overrule plaintiff's objections as to Exhibit Nos. 85-89, 91-99 and 103-105 and have considered this evidence for whatever probative value it is worth.

However, we sustain plaintiff's objection to defendant's Exhibit Nos. 90, 100-102 and 106-111. Exhibits 101-102 and 106-111 are advertising and promotional materials obtained from third parties' Internet home pages. Advertising and promotional materials are not printed publications admissible under Trademark Rule 2.122(e). See, e.g., *Hunt-Wesson Foods, Inc. v. Riceland Foods, Inc.*, 201 USPQ 881 (TTAB 1979); *Wagner Electric Corp. v. Raygo Wagner, Inc.*, 192 USPQ 33 (TTAB 1976); TBMP §708. Such advertising and promotional materials are not made admissible merely by virtue of their accessibility via the Internet. Next, defendant's Exhibit No. 90 appears to be a printout of an edition of an association's newsletter which is published on the Internet, and Exhibit No. 100 appears to be a printout from the Internet of a current list of publications published by and available from the Canadian Agricultural Library. We cannot determine on this record that Exhibit Nos. 90 and 100 were obtained from permanent-source printed publications. Accordingly, they are not the equivalent of NEXIS® articles which would be admissible under notice of reliance, but rather must be introduced by way of the testimony of the person who performed the Internet search and printed out the documents. Cf. *Raccioppi d/b/a Apogee Learning v. Apogee Inc.*, 47 USPQ2d 1368 (TTAB 1998). No such testimony is of record in this case. In short, for the



reasons discussed above, we have not considered defendant's Exhibit Nos. 90, 100-102 and 106-111.

Having ruled on the parties' respective evidentiary objections, we now shall address the merits of plaintiff's Section 2(d) claims. First, we find that plaintiff has established that it has used the designation FOOD-TEK, at least as a trade name, since a time prior to defendant's first use of its YOUR FOOD TECH PARTNER mark. Defendant concedes as much. (Defendant's Brief at p. 21.) Plaintiff's prior trade name use is sufficient to establish plaintiff's priority in this case. See Trademark Act Section 2(d).<sup>3</sup>

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<sup>3</sup> In its brief, defendant has argued that the designation FOOD-TEK is either generic for plaintiff's services or that it is merely descriptive and without secondary meaning as applied to those services. Defendant has made these arguments as alternatives to a third argument, i.e., that the designation FOOD-TEK or FOOD TECH is weak and diluted by numerous third-party uses, and that the mere presence of this designation in the parties' respective marks is an insufficient basis for finding the marks to be confusingly similar. However, defendant did not affirmatively allege in its answers to the notice of opposition and the petition to cancel that FOOD-TEK is generic or merely descriptive; those contentions were specifically made for the first time in defendant's brief on the case. Moreover, we cannot conclude on this record that those issues were tried by the express or implied consent of the parties, under Fed. R. Civ. P. 15(b). Because plaintiff was not on notice that the asserted genericness and/or mere descriptiveness of the designation FOOD-TEK would be at issue in this case, we have not considered defendant's arguments and evidence as to those matters. Likewise, to the extent that defendant's genericness and mere descriptiveness arguments are intended to support a contention that plaintiff does not have the requisite proprietary rights in the designation FOOD-TEK which are essential to plaintiff's standing and to its Section 2(d) ground of opposition, see *generally Otto Roth & Company, Inc. v. Universal Foods Corporation*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981), we have not considered the arguments. However, as part of our likelihood of

We turn next to the issue of likelihood of confusion. Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Defendant's services, as recited in its application and in its registration, are "providing information regarding food ingredient use." Plaintiff's services, according to the testimony of plaintiff's president, include "prototype development, product development, solv[ing] technical problems, provid[ing] advice to food manufacturers as to food processes and ingredients and regulatory guidance, prototypes, and do[ing] reformulations." (Finkel testimony deposition at 3.) Likewise, plaintiff's marketing brochure states that plaintiff has "expertise in ingredient technology" and specializes "in solving technical problems relating to food preparation," including in the areas of product development, reformulation, cost control, regulatory guidance, nutrition labeling, and pilot and prototype production. (Plaintiff's Exhibit No. 6.)

Defendant's services, as recited in the application and in the registration, are encompassed within and are

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confusion analysis, we have considered all of the admissible evidence of record as it pertains to the strength of, and the

essentially identical to the services rendered by plaintiff. Additionally, given the legally identical nature of the parties' respective services and the absence of any restrictions in defendant's recitations of services, we also find that defendant's recited services and plaintiff's services are offered in the same trade channels and to the same classes of purchasers. These facts all weigh in support of a finding of likelihood of confusion in this case.

However, we find that defendant's mark YOUR FOOD TECH PARTNER and plaintiff's trade name FOOD-TEK, when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression, are sufficiently dissimilar that confusion is not likely to result from their contemporaneous use, even if such use is in connection with identical services offered in the same trade channels to the same classes of customers. *See Kellogg Co. v. Pack'Em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

Our finding that defendant's mark is dissimilar to plaintiff's trade name is based primarily on the evidence of record which establishes that FOOD TECH, the only element of defendant's mark which is at all similar to plaintiff's trade name FOOD-TEK, is at the very least a highly

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scope of protection to be afforded to, the FOOD-TEK designation.

suggestive term as applied to the parties' services and as used in the food industry. It is undisputed that "food technology" is a generic term as applied to plaintiff's and defendant's services, and the evidence of record establishes that "food tech" would be understood by relevant purchasers to be a shorthand way of saying "food technology." It appears from the record that:

-- "tech" is a recognized and commonly-used abbreviation for "technology." (Dictionary definition, defendant's Exhibit No. 88.)

-- Plaintiff's president identifies himself as a "food technologist"; he stated that in adopting the name FOOD-TEK, he was trying to connote "food technology"; he stated that he probably has used "food tech" as a term of art to refer to "food technology." (Finkel Disc. Dep. at 30, 117.)

-- "Surfin' the Food Tech Net" was used and advertised as the theme of the Eastern Food Science Conference X, held November 2-5, 1997 in Newport, Rhode Island. (Defendant's Exhibit No. 91.)

-- In an article from the January 25, 1995 edition of Journal (Ogden Newspapers 1995), it was reported that Tim Louie, whose family manufactures fortune cookies and other food products in Seattle, Washington, "went to the University of Washington, where he majored in small business administration. He also took as many food tech classes as he could." (Defendant's Exhibit No. 95.)

Moreover, the evidence of record shows that the term FOOD TECH, and variants thereof, appear in the names of numerous third parties throughout the food industry,

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See discussion *infra*.

including third parties engaged in services of the very type provided by plaintiff and defendant:

-- from Prepared Foods (November 1997): "FMC Food Tech is the new name of FMC's expanded food machinery business." (Defendant's Exhibit No. 94.)

-- from Dallas/Ft. Worth Business Journal (Feb. 29 - March 6, 1988): "However, for its new microwave products, Zebbie's turned to Food Tech, a research and development company in Waxahachie [Texas]." (Defendant's Exhibit No. 96).

-- from Food & Drink Daily (Dec. 5, 1994): "Food Tech's irradiation facility is located ten miles from headquarters in Plant City [Florida]. . ." (Defendant's Exhibit No. 97.)

-- from The Des Moines Register (Dec. 1, 1996): "The three basic components of a successful new food product are experience, time and money, says Carol Lloyd of Austin Food Tech Inc., an Anaheim, Calif., contract food-product developer." (Defendant's Exhibit No. 98.)

-- from Milling & Baking News (Oct. 21, 1997): "Thomas E. Belshaw, Food Tec, Inc., Renton Wash., chairman of the International Baking Industry Exposition Committee. . ." (Defendant's Exhibit No. 103.)

-- from the 1997 IFT (Institute of Food Technologists) Annual Meeting Program and Food Expo Exhibit Directory (held June 14-18, 1997 in Orlando, Florida): "FOODTECH DENMARK" is listed in the Directory of Exhibitors (at p. 364). (Defendant's Exhibit No. 18.)

-- from the July 1998 issue of Food Technology ("A Publication of the Institute of Food Technologists") at page 97: the magazine's "Reader Service Reply Center" for information on products and services advertised in the magazine features an electronic inquiry service called "IFT FOODTECH E.XPRESS." (Defendant's Exhibit No. 17.)

Finally, it appears that numerous trade shows in the food industry use variations of the term "food tech" in connection with their trade shows, as is evidenced by the references to such shows found in the U.S. trade press:

-- from the 1997 IFT (Institute of Food Technologists) Annual Meeting Program and Food Expo Exhibit Directory (held June 14-18, 1997 in Orlando, Florida): "FOOD TECH EXPO ONLINE" is the name of IFT's "online exhibition containing easily searchable virtual booths displaying exhibitor information on food industry products and services to professionals throughout the world." (Defendant's Exhibit No. 18.)

-- Trade Shows Worldwide - An International Directory of Events, Facilities & Suppliers (Gale Research, 13<sup>th</sup> Ed. 1998) includes listings for ten different international trade shows directed to the food technology, food processing, and food packaging industries:

- "Anuga FoodTec" (Germany)
- "China Foodtech" (Hong Kong)
- "Foodtech" (New Zealand)
- "Foodtech Bangkok" (Bangkok)
- "Foodtech" Hong Kong
- "Foodtech" (Poland)
- "Foodtech Russia" (Russia)
- "Foodtech Shanghai" (China)
- "Levant Foodtech" (Germany)
- "PFP Expo/Foodtech South China (China)

-- from Food Engineering News (Dec. 1994): an article about a trade show in Japan known as "Foodtech"

-- from Dairy Foods (Jan. 1993): an article about a trade show in Germany called "DLG-Food Tech"

Based on this evidence that the term FOOD TECH is at least highly suggestive and also used by numerous third parties in the relevant industry, we find that purchasers are not likely to assume, merely because plaintiff's trade

name is FOOD-TEK and because the words FOOD TECH also appear in defendant's mark, that a source, sponsorship or other connection exists between defendant's and plaintiff's respective services.

Moreover, we agree with defendant's contention that its mark YOUR FOOD TECH PARTNER, viewed in its entirety and in light of the industry meaning and usage of the term FOOD TECH, connotes that defendant is available to be the customer's partner in the customer's endeavors in the field of food technology. That "partnership" connotation is not present in plaintiff's trade name FOOD-TEK.

The difference in the respective connotations of defendant's mark and plaintiff's trade name, along with the other obvious differences between the respective designations in terms of their appearance and sound, give defendant's mark and plaintiff's trade name overall commercial impressions which are sufficiently dissimilar to preclude a finding of likelihood of confusion.

Because plaintiff has failed to establish the existence of a likelihood of confusion, its Section 2(d) claims in the opposition and the cancellation proceedings fail. No ground for opposition or cancellation having been established, the opposition and the cancellation accordingly are hereby dismissed.

However, it is apparent from defendant's arguments and evidentiary submissions that defendant deems the words FOOD TECH to be generic and/or merely descriptive as applied to services in the field of food technology.<sup>4</sup> We note that the recitation of services in defendant's application Serial No. 74/529,590, the application involved in this opposition proceeding, includes such services.

In view thereof, and assuming that defendant ultimately prevails in this opposition proceeding (that is, assuming that plaintiff does not appeal our dismissal of the opposition within the time allotted by the rules and that plaintiff does not prevail on any such appeal), the Board shall remand application Serial No. 74/529,590 to the Trademark Examining Attorney for a determination of whether it is appropriate to require defendant to disclaim the words FOOD TECH apart from the mark as shown, pursuant to Trademark Act Section 6, 15 U.S.C. §1056. See Trademark Rule 2.131, 37 C.F.R. §2.131; see generally TBMP §805.<sup>5</sup>

**Decision:** Opposition No. 99,676 and Cancellation No. 24,523 are dismissed. Application Serial No. 74/529,590

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<sup>4</sup> See *supra* at footnote 3.

<sup>5</sup> Defendant's Registration No. 1,896,675, involved in Cancellation No. 24,523, is not affected by the Board's remand of application Serial No. 74/529,590.



shall be remanded to the Trademark Examining Attorney for reexamination pursuant to Trademark Rule 2.131.

E. J. Seeherman

H. R. Wendel

C. M. Bottorff

Administrative Trademark Judges  
Trademark Trial and Appeal Board